

As a result of the work-related injury of December 18, 1993, claimant was awarded a permanent total disability. Thereafter, claimant received a kidney transplant. Based upon this change in claimant's medical condition, respondent filed for review and modification of the Award. On March 20, 1998, the ALJ rendered his Decision on Review

and Modification whereby respondent's application for a modification of the award was denied. Claimant's counsel submitted an itemization of his time spent defending the Award against respondent's application for review and modification. On June 5, 1998, the ALJ entered a Supplemental Decision on Review and Modification granting claimant attorney fees for the full 28.8 hours of services requested but reducing the hourly rate from the \$150 per hour requested to an hourly rate of \$100. Respondent appealed that award of attorney fees alleging claimant was not entitled to an award for any attorney fees and also challenging the reasonableness of the amount of attorney's fees the ALJ awarded.

Respondent first contends that the present version of K.S.A. 44-536(g) applies and that there have been substantive changes in the statute which preclude an award for attorney fees in situations such as those presented in this case. The Kansas Court of Appeals, however, has determined that the date of contract controls what version of that statute is applicable and, furthermore, that the amendments to K.S.A. 44-536(g) did not change the circumstances wherein attorney fees may be awarded post-award.

It is not clear from the record when claimant entered into a contract for legal services with her attorney, . . . K.S.A. 44-536(g) has been amended several times since the date of claimant's injury. Although the date of the contract controls the version of 44-536(g) applicable to the contract, the resolution of this case is not dependent on the date of claimant's contract for legal services because the amendments tend to clarify the pertinent provisions of the statute rather than change it.<sup>1</sup>

K.S.A. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and **in connection with an application for review and modification**, a hearing for additional medical benefits, **or otherwise**, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of compensation, the attorney fees shall be paid from such amounts of compensation. If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for

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<sup>1</sup> May v. The University of Kansas, Docket No. 78,937 (Kan. App., *opinion filed* 4/24/98)

compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. (Emphasis added.)

The words “or otherwise” in the statute support claimant’s argument that his claim for attorney fees is authorized by K.S.A. 44-536(g) because the statute does not limit an award of attorney fees to any particular type of attorney service so long as it occurs subsequent to the ultimate disposition of the original claim.

The services rendered by claimant’s counsel certainly benefited claimant because respondent’s application for review and modification, if successful, would have reduced claimant’s benefits. The ALJ’s order did not result in an award of additional compensation to claimant and therefore there is no fee that can be paid from such amounts. It is granted, as respondent contends, that the most recent version of the attorney fee statute does not specifically address our fact situation where, instead of there being a denial of additional compensation, there was a denial of a reduction in compensation. Nevertheless, the Appeals Board finds attorney fees are contemplated by the Act and are recoverable. The 1997 amendments added several phrases to clarify when and which party should pay when attorney fees are awarded, but they do not otherwise limit the circumstances under which attorney fees can be awarded from the earlier version of the statute. Accordingly, under either version of the statute attorney fees are recoverable. Finally, to the extent the Court in May directed that “the attorney work contemplated by the statute must be directed toward securing additional benefits for the claimant,” the Board finds that the attorney work performed in this case, while not directed toward securing “additional benefits” they certainly were of a benefit to claimant and were directed toward preventing the respondent securing an award for fewer benefits for the claimant. The Court in May was distinguishing ministerial services from attorney services. That is not the situation here. There is no allegation that the services performed by claimant’s counsel were merely ministerial or of no benefit to the claimant. As claimant’s counsel stated in his brief, “[i]t simply violates common sense that the Legislature would intend to allow for the award of attorney fees if the Respondent was successful in their motion to modify but disallowed when the Claimant is successful in defeating Respondent’s motion.”

The Board finds K.S.A. 44-536(g) allows for claimant’s attorney fees to be awarded where a respondent’s motion to modify an award is denied.

Respondent, in its Application for Workers Compensation Board Review, also raised an issue concerning the reasonableness of the amount of attorney fees awarded. This issue, however, is not discussed in respondent’s brief to the Board. Furthermore, it was not raised before the ALJ. There was no hearing conducted or requested before the ALJ on claimant’s itemized statement of professional time spent in this case. The Board’s review of that time sheet discloses no obvious errors, inconsistencies, or exaggerations. The services rendered appear consistent with the progress of the proceedings and evidence presented, and the time expended for those services likewise appear reasonable. As we stated, the ALJ reduced claimant’s hourly rate from the \$150 requested to a rate of

\$100 per hour. The Appeals Board has previously held this rate to be reasonable.<sup>2</sup> The Appeals Board cannot ascertain whether it is the hourly rate or the number of hours, or both, that respondent objects to. Nevertheless, that objection should have been presented to the ALJ. In any event, the Appeals Board concludes the amount awarded by the ALJ is reasonable.

Finally, claimant requests an attorney fee award for time expended in connection with this appeal. That request must first be presented to the ALJ.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Supplemental Decision on Review and Modification entered by Administrative Law Judge Robert H. Foerschler, dated June 5, 1998, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Donald T. Taylor, Kansas City, KS  
Kenneth J. Hursh, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director

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<sup>2</sup> Fife v. The Boeing Company - Wichita, Docket No. 162,556 (June 1997)